SPECIAL ARTICLE

NON-DISCLOSURE OF MEDICAL ERRORS AN EGREGIOUS VIOLATION OF ETHICAL PRINCIPLES

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SUMMARY
Medical errors will likely continue as long as clinicians remain fallible humans. Once they occur though, what should be the attitude of the medical profession? Should it be to withhold such information from patients since 'what they don't know can't hurt them' or should such information be honestly disclosed to patients and the appropriate measures taken to redress and prevent any such errors in future? Although most doctors believe that errors should be disclosed to patients when they occur, in reality, most doctors and institutions do not disclose such mishaps to patients and their families. Rather, they engage in extensive cover ups under the guise of protecting the doctor-patient relationship and not causing harm to patients. This paper, however, will show that non-disclosure of medical errors to patients and/or their families is a violation of ethical principles and cannot ever be justified.

By not disclosing a medical error, the doctor conspicuously places his own interests above that of the patient to the detriment of the patient, thereby violating a patient-centered ethic. Moral courage is therefore needed if doctors are to do the right thing when medical errors occur. This moral courage can be facilitated by institutions having policies and guidelines on disclosure of errors in place, training doctors and other hospital staff on how to disclose medical errors and providing emotional support for doctors who make mistakes in their efforts to treat patients and save lives.

Keywords: Nondisclosure, medical errors, truth telling, liability, litigation

INTRODUCTION
Errare humanum est: "to err is human" is a well known saying that captures the fallibility of human beings. Humans are fallible and as such they will make mistakes in their lives and work be they builders, bankers or doctors.

The Institute of Medicine's report, "To Err is Human: Building a Safer Health System" bears witness to the fact that medical errors are not uncommon.[1] According to this report, which defined an error as "the failure of a planned action to be completed as intended or the use of a wrong plan to achieve an aim", over one million preventable adverse events occur each year in United States hospitals as a result of healthcare. Of these events, an estimated 100 000 caused patients serious harm, while between 44 000 and 98 000 led to death in hospitals in the United States. According to this report, more people die annually from preventable adverse events related to healthcare than from motor vehicle accidents (43 458), breast cancer (42 297), or AIDS (16 516) in the United States. This grim report indicates how common it is for medical practitioners to make errors in their day to day clinical practice.

Although medical errors will likely continue as long as clinicians remain fallible humans, it does not mean that it should be accepted as a matter of fact. Once they occur though, what should be the attitude of the medical profession? Should it be to withhold such information from patients since 'what they don't know can't hurt them' or should such information be honestly disclosed to patients and the appropriate measures taken to redress and prevent any such errors in future? The cultural change in acceptable medical behaviour from a paternalistic stand of not wanting to upset the patient to that of open discussion makes it imperative that doctors tell their patients the truth since deception in medical practice is no longer acceptable. This change is supported by the fact that the codes of ethics of most medical associations address disclosure of errors and incompetence.

For example, the Ghana Medical Association Guiding Principles states, "Patients have a right to receive relevant information about their own medical condition and its management…Medical and Dental practitioners must always inform patients promptly of any signifi-

cant errors that may be occurred in the course of investigation or treatment".[2] The American Medical Association Principles of Medical Ethics states, "A doctor shall …be honest in all professional interactions".[3] In addition, when "a patient suffers significant medical complications that may have resulted from the doctor's mistake . . . the doctor is ethically required to inform the patient of the facts necessary to ensure understanding of what has occurred".[4] A doctor is thus ethically bound to admit mistakes to the patient. Such ethical requirement is supported by both deontological and consequentialist perspectives.[5] That is, by considering the ethical value of the action alone and by considering the possible consequences of the action; it becomes obvious that the right thing to do when errors occur is for doctors to tell patients about the errors.

Although most doctors do believe that errors should be disclosed to patients when they occur, in reality, most doctors and institutions do not disclose such mishaps to patients and their families. Rather, they engage in extensive cover ups under the guise of protecting the doctor-patient relationship and not causing harm to patients. This is supported by evidence in the literature that doctors disclose errors to patients in less than half of instances when a serious error occurs.[6]

Since doctors are ethically bound to disclose errors that cause or may cause harm to patients, this paper will show that non-disclosure of medical errors to patients and/or their families is an egregious violation of ethical principles and cannot be justified.

THE CASE FOR DISCLOSURE

The doctor-patient relationship, unlike an arms-length transaction, is a fiduciary relationship. A fiduciary is "one who owes to another the duties of good faith, trust, confidence and candour".[7] As a fiduciary relationship, it must rely on principles of autonomy, nonmaleficence, beneficence, justice and fidelity at all times.[8]

Autonomy

The principle of respect for autonomy is more than not interfering in others affairs, according to Beauchamp and Childress. It includes, at least in some contexts, obligations to build up or maintain others' capacities for autonomous choice while helping to allay fears and other conditions that destroy or disrupt their autonomous actions. Respect, on this account, involves acknowledging decision-making rights and enabling persons to act autonomously, whereas disrespect for autonomy involves attitudes and actions that ignore, insult or demean others' rights of autonomy.[9]

Autonomy which protects patient self determination goes hand in hand with truth telling. Non-disclosure of medical errors to patients therefore ignores, insults and demeans their rights of autonomy. In addition, deceiving patients interferes with the doctrine of informed consent since patients may not understand the reason or need for additional interventions or a longer hospital stay that becomes necessary as a means of rectifying an undisclosed error. It is therefore important to disclose errors in order to respect autonomy and facilitate the giving of informed consent.

Nonmaleficence

"The principle of nonmaleficence asserts an obligation not to inflict harm on others".[7] It is a passive obligation captured by the maxim *Primum non nocere*: "Above all [or first] do no harm." A medical error thus threatens the very foundation upon which generations of doctors have practiced and continue to practice medicine. Although an error may harm a patient, failure to disclose the error to the patient makes the situation worse. A patient may worry needlessly about his or her prolonged stay or worsening condition thinking it is a result of the underlying disease. Knowing that what is happening is a result of an error that occurred may prevent this psychological distress from impacting negatively on the patient's condition. Rather than adding insult to injury, the doctor can subtract insult from injury by doing whatever is necessary to prevent further harm to the patient.[10] Such actions include informing the patient about the mistake and letting him or her know about the necessary steps taken to reduce the harm and prevent further occurrence of such errors.

Beneficence

"The principle of beneficence refers to a moral obligation to act for the benefit of others".[7] Although not all acts of beneficence are obligatory, this principle establishes an obligation for health care professionals to help their patients further their important and legitimate interests. Such legitimate interests include the prevention and removal of harms. Failing to disclose a medical error that has occurred to a patient and letting the patient assume that what he or she is going through is due to the disease is unkind and violates the principle of beneficence. On the other hand, the patient's knowledge and understanding that a mistake or error has occurred may relieve anxiety about slow recovery or complications and will certainly bring benefits.[6]

Justice

The principle of justice can be construed as "fair, equitable, and appropriate treatment in light of what is due or owed to persons".[7] In essence, patients should get what they are owed or what they deserve. The principle of justice therefore dictates disclosure of an error in

order to ensure compensation to patients. Patients may be owed compensation for increased health care costs or lost wages in addition to an apology, which nearly all patients demand as the minimum.[11] If patients harmed by medical errors are to get any justice at all, then "disclosure and apology, the "confession" that begins the process…together constitute the first step towards meeting the patient's needs and expectations".[9] Knowing about the error will therefore enable patients get the necessary compensation, for example, getting the hospital bill written off or receiving monetary compensation for lost income.

Fidelity

Obligations of fidelity in medical practice can best be understood as norms that specify the moral principles discussed above, in particular, those of autonomy and justice.[7] Applying these principles yield obligations of veracity and fidelity. Although doctors' obligations of fidelity demand that they should be truthful with their patients, sometimes, a misguided desire to 'protect patients from harm' makes doctors less than truthful with patients. However, since most patients want to know about even minor errors,[6] claiming that non-disclosure protects patients is false. Given that the heart of the doctor-patient relationship is honest communication, deceiving patients not only undermines the veracity of the individual doctor; it also casts serious doubt on the trustworthiness of the medical profession as a whole.[12]

These arguments show that disclosure of medical errors to patients is justified on moral grounds and upholds principles of autonomy, nonmaleficence, beneficence, justice and fidelity that are fundamental to the fiduciary nature of the doctor-patient relationship.

WHY THE CASE AGAINST DISCLOSURE FAILS

Although several reasons such as legal liability, patient distress, and loss of reputation and privileges as well as license revocation among others have been cited as reasons why doctors fail to disclose errors to patients,[13] these do not justify the non-disclosure of errors to patients.

It is important to note that at the heart of non-disclosure is deception, a violation of the moral rule "do not deceive." In order for a violation of a moral rule to be justified, the following three conditions must be satisfied.[14] Everyone agrees that all justified violations of the rules are such that if they are justified for any person, they are justified for every person when all of the morally relevant features are the same. It must be rational to favour everyone being allowed to violate the rule in these circumstances.

A violation is justified only if it is rational to favour that violation even if everyone knows that this kind of violation is allowed. Since deception of patients in the form of non-disclosure of medical errors does not satisfy any of the above conditions, it is an unjustified violation of an important moral rule.

Legal liability

There is no denying that the threat of legal liability is a clear and present danger in medical practice, especially when things do not go the way the patient and/or his family expect. Doctors get sued when things go wrong or outcomes are unexpected. In as much as bad outcomes and medical errors are some of the reasons why patients may seek a legal redress, there is evidence to the fact that poor communication after an error has occurred is a very significant factor in malpractice litigation. This is embodied in one lawyer's observation:

In over 25 years of representing both doctors and patients, it became apparent that a large percentage of patient dissatisfaction was generated by doctor attitude and denial, rather than the negligence itself. In fact, my experience has been that close to half of malpractice cases could have been avoided through disclosure or apology but instead were relegated to litigation. What the majority of patients really wanted was simply an honest explanation of what happened, and if appropriate, an apology. Unfortunately, when they were not only offered neither but were rejected as well, they felt doubly wronged and then sought legal counsel.[15]

Although malpractice litigation aims at getting compensation for patients who have been injured as a result of negligence, a concept which is supported by the principle of justice, it also has the effect of inhibiting the disclosure of medical errors. While the argument for disclosure of errors has been made by some writers, others have strenuously disagreed with it contending that "full disclosure could certainly provide an otherwise uninformed patient with a basis for litigation". [13]

The question that needs answering is whether disclosure pacifies potential litigants or leads to a surge in litigation. Despite the fact that there are no definitive studies evaluating the effect of disclosure on litigation, there are indicators to the fact that communicating openly with patients decreases the claims and compensations sought by patients. The Veterans Hospital of Lexington, Kentucky, for instance, reported reduced liability payments compared with comparable facilities after instituting a full disclosure policy.[16] Similarly, after instituting a comprehensive program which included open communication with patients and their representatives, apologizing for their mistakes and

learning from them, open discussions with claimants and voluntary compensation of those harmed by errors, the University of Michigan's attorneys fees decreased by two thirds while their malpractice filings decreased by 50%. In addition, the time from opening to closing of a case decreased markedly from 3 years to 1 year.[15] Similar findings have also been seen with the disclosure and early intervention program of the Colorado Physicians Insurance Company.

Although other indicators suggest that disclosure might not decrease malpractice, for instance, about a third of families filing malpractice claims were told that errors caused their children's injuries, and 39% of patients after full disclosure would still seek legal advice, failure to disclose is certainly associated with an increased desire to sue.[14] Since patients are more likely to sue if doctors do not disclose errors than if they do, trying to minimize litigation through non-disclosure is not ethically and legally sound.

Patient distress

Another reason why doctors refrain from disclosing errors to patients is causing patients distress. "Doctors might be permitted not to tell if they have good reason to believe that disclosure would undermine the patient's autonomy in some way (e.g. incapacitate the already severely depressed patient). Or the patient might have told the doctor explicitly, 'Doctor, if anything goes wrong, I don't want to know about it'".[4]

The argument is that patients are more likely to become distressed to the point of becoming irrational or being severely damaged psychologically when they get to know about the errors that have occurred, rather than if they had remained ignorant of such errors. As such, they may be unable to make the appropriate decisions regarding their care. Since 'what you don't know can't hurt you', such benevolent deception, or the invocation of the therapeutic privilege, is justified in cases where it is likely that the patient may be harmed by knowing about the error.

"The therapeutic privilege permits doctors to tailor (and even withhold) information when, but only when, its disclosure would so upset a patient that he or she could not rationally engage in a conversation about therapeutic options and consequences".[17] Since doctors are to "above all, do no harm" while doing what is beneficial for their patients, if disclosing a medical error is deemed harmful to patients, the doctor may be morally justified by not disclosing such information since it would not be in the patient's best interest to know. The doctor is therefore able to uphold the ethical principles of nonmaleficence and beneficence instead of violating them.

This argument, however, is untenable. The fact that patients may be distressed on being told about medical errors does not justify keeping such information from them. It is natural for patients to get upset when preventable errors occur during their care but that does not mean that their ability to make rational decisions is impaired. In any case, emotional factors do not necessarily impair an individual's decision making ability. As Côté[18] rightly indicates, because many doctors feel that emotions are "bad," unscientific, or unpredictable, they tend to overestimate the degree to which patients find information troublesome. In addition, doctors also tend to have an "ill-perceived conception of psychic injury" that supposedly follows an upsetting disclosure. Thus, they tend to equate upset with harm. A lack of appreciation on the part of some doctors about the usefulness of patients' emotional states may also cause them to overlook the positive aspects of disclosure. However, when information is sensitively disclosed to patients, it may actually prevent the psychological harm that has been readily used by doctors as an excuse to withhold information from patients.

In addition, there is evidence to the fact that informing patients truthfully and compassionately about errors does not result in an increase in their distress.[5] Although patients describe a variety of emotional responses after a medical error including sadness, anxiety, feeling traumatized, fearing additional errors, anger at prolonged recovery and frustration at the error being preventable, many also believed that their emotional responses after disclosure was directly affected by the manner in which the error was disclosed. While patients indicated they would be less upset if the disclosure was done honestly and compassionately with an apology, they also indicated that their distress would be increased with error explanations that were evasive or incomplete. What increases patient distress is evasive or incomplete disclosure and not honest and compassionate disclosure of medical errors.

Loss of reputation and privileges and license revocation

Medicine with its tradition of handling errors by assigning blame contributes to the tendency by doctors to not disclose errors when they occur.[19] Being singled out, losing privileges, reputation and/or licensure in addition to the profound shame and humiliation that sometimes confronts a doctor when an error occurs is enough to prevent many doctors from disclosing errors to patients.

Doctors are rightly concerned about whether the benefits of disclosing errors to patients are worth the risks they may experience. In particular, nobody wants to lose their livelihood if it can be avoided. Thus although

the temptation to protect one's reputation may be high, it is worth remembering that the doctor will likely find himself or herself in a worse situation when the patient eventually gets to know that not only was an error made, but insult was added to injury by the doctor failing to disclose this error. As the American Medical Association's Council on ethical and judicial affairs states, "concern regarding legal liability which might result following truthful disclosure should not affect the doctor's honesty with a patient".[3] By extension, concern regarding damage to reputation, loss of privileges and/or licensure should not prevent the doctor from doing the right thing by being honest with a patient.

In addition, the medical profession and society at large need to accept and recognize mistakes as unavoidable, albeit, unfortunate part of clinical practice. As such, the right measures in dealing with such errors must be instituted. With the proper guidelines in place regarding what doctors must do when an error occurs, training doctors in how to disclose medical errors as well as the proper structures for emotional support in place for doctors who make mistakes,[4] a lot more doctors would be willing to disclose errors when they occur.

CONCLUSION

Medical errors will continue to be an unfortunate but unavoidable aspect of medical practice. While many doctors under the guise of concern for patient welfare do not disclose medical error, such behaviour is not ethically justified. The fiduciary nature of the doctor-patient is such that the doctor is ethically obligated to disclose medical errors to patients.

The principle of respect for autonomy directs the doctor to disclose errors to patients since it gives patients an insight into what is going on. It also reduces the associated concern and psychological distress that the patient may have. In addition, it facilitates the process of informed consent and makes the patient a participant in his or her medical care. The principle of nonmaleficence directs doctors not to harm patients. The doctor or health institution that fails to disclose an error consequently causes a 'double jeopardy' by delivering substandard care as well as failing to inform the aggrieved party, thereby depriving the party of a just recompense.[20]

The principle of beneficence entreats doctors to provide benefits to their patients by disclosing medical errors even when doing so puts the doctor at risk of financial loss as well as loss of reputation and privileges. The principle of justice enjoins disclosure in order for patients to get what is due them. Honest disclosure will enable patients not only to get the apology they so desire but it will also facilitate any additional treatment that may be necessary as a result of the error and provide other compensations as well. Since truth-telling is vital to the fidelity involved in the doctor-patient relationship, disclosing medical errors is likely to help re-establish or strengthen the trust in the doctor-patient relationship thereby making the relationship stronger.

Conversely by not disclosing a medical error, the doctor conspicuously places his or her own interests above that of the patient to the detriment of the patient, thereby violating a patient-centered ethic.[18] Moral courage is therefore needed if doctors are to do the right thing when medical errors occur. This is because when patients are kept in the dark regarding medical errors, their abilities to make decisions about their care is impaired; they endure harm rather than benefits; the trust necessary for the doctor-patient relationship is undermined and above all, the likelihood of litigation increases significantly. This moral courage can be facilitated by institutions having policies and guidelines on disclosure of errors in place, training doctors and other hospital staff on how to disclose medical errors and providing emotional support for doctors who make mistakes in their efforts to treat patients and save lives.

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